IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-871

JOHN R. MANSON, Commissioner of Correction of the State of Connecticut, *Petitioner*,

v.

NOWELL A. BRATHWAITE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, John R. Manson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on November 20, 1975. The decision reversed the judgment of the United States District Court for the District of Connecticut which by decision, dated May 13, 1975, dismissed the Respondent's petition for a writ of habeas corpus.

OPINIONS BELOW

The Connecticut Supreme Court on April 5, 1973, affirmed the Respondent's conviction after a trial to a jury of twelve. The opinion of the Court (Appendix, pp. 1a to 4a) is reported at 164 Conn. 617, 325 A.2d 284. The District Court's opinion dismissing the Respondent's petition (Appendix, pp. 5a to 11a) is not officially reported on this date. The opinion of the Court of Appeals reversing the judgment of the District Court (Appendix, pp. 12a-29a) is not officially reported on this date.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1975. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

QUESTIONS PRESENTED

1. The first question presented is whether evidence received at trial of an impermissibly suggestive photographic identification by a witness for the prosecution renders the Respondent's conviction violative of due process, notwithstanding the receipt of other evidence during the trial serving as a valid basis for an in-court identification by the same witness. In other words, has the Court of Appeals erred in its interpretation of this Court's decision in *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); namely, that the factors to be considered in evaluating the likelihood of misidentification therein recited (pp. 199-200) apply only to cases which arose before this Court's decision in *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) and the principle enunciated therein (pp. 301-302).

2. The second question presented is whether the Court of Appeals erred in substituting its judgment of the facts for that of the trier (Appendix, pp. 26a, 27a) in reaching its conclusion that for other reasons the conviction should not stand.

STATEMENT OF THE CASE

On May 5, 1970, at about 7:45 P.M., Jimmy D. Glover, a black undercover State Police Officer, and an informant went to a third floor apartment at No. 201 Westland Street, Hartford, to purchase narcotics from a suspected seller. After he knocked the door opened twelve to eighteen inches and Glover observed a black male standing in front of a female inside the apartment. It was not dark, there was natural light coming from the outside

through the windows into the hallway, and Glover had no difficulty seeing. After the informant identified himself, Glover asked the male for some narcotics. This person asked Glover to repeat his request and when he did, the person held out his hand and Glover handed him two $10 bills. Two or three minutes elapsed before the door closed. After a few moments the door reopened and the same male person placed two glassine bags from his left hand into Glover's hand before the door closed again. From the time it opened until the door closed a second time five to seven minutes elapsed. During the entire period the door was open there was light coming from within the apartment and Glover stood within two feet of the person from whom he made the purchase while looking at his face. During the time of the sale Detective Michael D'Onofrio of the Hartford Police Department was stationed outside the building acting as a covering officer for Glover. Later the same evening Glover, who did not know his seller by name, described him to D'Onofrio as being a dark-complexioned black male, approximately five feet eleven inches tall, heavy build, black hair in an Afro style, with high cheek bones, wearing blue pants and a plaid shirt. D'Onofrio who recognized the description given as that of Nowell Brathwaite obtained a photograph of Brathwaite and he dropped the photograph off at State Police Headquarters. Two days after the sale while at headquarters Glover looked at the photograph and identified the person shown as the same person from whom he had purchased the narcotics.

Brathwaite was place under arrest in August 1970. His arrest took place at a third floor apartment at No. 201 Westland Street, Hartford, the same third floor apartment at which the sale had taken place. At the time Brathwaite was visiting a Mrs. Ramsey, who was a friend of his wife, and he admitted that he had visited this apartment "lots of times" prior to the date of the offense.

On January 8, 1971, during the trial of the case, the photograph from which Glover had identified Brathwaite was received in evidence without objection. Glover who had not seen Brathwaite since the date of the sale, testified unequivocally ("There is no question whatsoever") that the person shown in the photograph was the same person from whom he had made the purchase. Glover, also without objection, made a positive in-court identification of Brathwaite.

The Respondent was found guilty by a jury of both counts of a criminal information charging him with the illegal sale and possession of narcotics. He was on the date of his petition to the District Court in State custody pursuant to the sentence imposed by the State trial court. Federal jurisdiction of the District Court was based on the provisions of 28 U.S.C., Sec. 2254.

REASONS FOR GRANTING REVIEW ON CERTIORARI

Review by this Court of the decision below is called for because the decision of the Court of Appeals is in conflict with decisions on the same or similar issue by other Courts of Appeal, and for the further reason that the decision of the Court of Appeals is based on an interpretation of federal law which has not been, but should be, determined by this Court.

Review by this Court is further called for because the Court of Appeals in reversing the decision of the District Court and the verdict of the State trial court has weighed the evidi-dence, decided issues of credibility, and substituted its judgment for that of the trier.

I.

An examination of the cases on which the Court of Appeals relies in support of its conclusion that the decision of *Neil* v. *Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 was in-

tended to qualify the exclusionary rule of *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967) only as to pre-*Stovall* cases shows that only the Fourth Circuit *[Smith* v. *Coiner*, 473 F.2d 877, 882 (1973), cert. den. sub nom. *Wallace* v. *Smith*, 414 U.S. 1115 (1973)] in reversing the District Court's result is in strict accord. Even there a strong dissenting opinion (Murray, J.), in which the *Biggers* guidelines are applied to the facts of the case, concludes as follows (p. 889):

> "In the present case I think the Supreme Court would reach the same conclusion it reached in *Neil* v. *Biggers* namely: 'The evidence was properly allowed to go to the jury.'"

The Fifth Circuit case of *Rudd* v. *State of Florida*, 477 F.2d. 805 (1973) also cited by the Court of Appeals in support of its decision is less than conclusive. The subject offense having occurred December 7, 1968 (*Rudd* v. *State of Florida*, 343 F. Supp. 212, 215), the case is in the post-*Stovall* period. Neverthelesss the appeals court recites that, notwithstanding the State's error in offering constitutionally deficient identification evidence stemming from a tainted procedure, other evidence could have been offered (it was not) to show that the error was harmless:

> "In *Simmons* the Court held that the state commits constitutional error in eliciting in-court identifications by witnesses who have attended pretrial identification proceedings 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' Id. at 384, 88 S.Ct. at 971, 19 L.Ed.2d at 1253. While the habeas court did, as we have noted, correctly determine that the showup was impermissibly suggestive, it did not specifically find that the showup was likely to induce irreparable misidentification, a finding indispensable to proper application of the *Simmons* test. See *Neil* v. *Biggers*,

409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401, 410-411 (1972); *United States* v. *Sutherland*, 428 F.2d 1152, 1155 (CA5 1970). On this cold record we cannot make the required factual determinations." Id. p. 809.

The *Rudd* court seems to be saying that the *Biggers* guidelines have a clear application to cases more recent than *Stovall*.

Workman v. *Cardwell*, 471 F.2d 909 (1972), cert. den. 412 U.S. 932 (1973) decided in the Sixth Circuit, is also out of the category of pre-*Stovall* cases (see *Workman* v. *Cardwell*, 338 F. Supp. 893, 894). Whether it lends support to the conclusion of the Appeals Court in the instant case is unclear. The decision, which turned on a single photo showup subsequent to the issuance of an arrest warrant when the same witness could make no identification from twenty photographs shown to him shortly after the robbery, does not cite *Biggers* or even refer to the existence or nonexistence of other evidence which might have strengthened the identification.

A more recent case from the same Sixth Circuit which concerned a 1970 offense is far more in point and reaches a result contrary to the Brathwaite court:

> "The record fully supports these findings, which constitute precisely the elements that refute a due process claim under the Supreme Court's decision in *Neil* v. *Biggers*, 409 U.S. 188, 199-200, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972). Thus, although the showups may have been 'unnecessarily suggestive' and although the showups may have been poor substitutes for lineups or other more acceptable confrontations, *Biggers* requires rejection of Appellant's claim." (i.e. that his due process rights were violated by the admission of testimony concerning showups which were unnecessarily suggestive and conducive to irreparable misidentification). "The central question [is] whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. 409 U.S. at 199."
>
> *Holland* v. *Perini*, 512 F.2d 99, 103-104 (1975).

That the Seventh Circuit (Stevens, J.), although recognizing the evils of a suggestive showup, also disagrees with the conclusion of the Court of Appeals is clear:

> "The Justices have plainly told us that the admission of evidence of a showup does not necessarily violate due process. Logically, that statement applies equally to showups which occurred after as well as before the *Stovall* decision. For nothing in the *Stovall* decision itself implied that any redefinition of due process standards occurred on June 12, 1967."
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> *United States ex rel. Kirby* v. *Sturges*, 510 F.2d 397, 406-407 (1975), cert. den. —— U.S. ——, 44 L.Ed.2d 685, 95 S.Ct. 2424. See also *United States ex rel. Pierce* v. *Cannon*, 508 F.2d 197, 204 (1974); *Israel* v. *Odom*, 521 F.2d 1370, 1375-1376 (1975).

As Judge Stevens points out in *Kirby* (N. 32) "since *Stovall* did not purport to fashion any general exclusionary rule — as opposed to analysis of the circumstances of particular cases — it does not seem reasonable to interpret *Stovall* as marking the effective date of a brand new exclusionary rule." Id. p. 407.

Disagreement with the Brathwaite court's result may also be inferred from a reading of the First Circuit's opinion in *Nassar* v. *Vinzant*, 519 F.2d 798 (1975) where in evaluating the constitutional effect of in-court testimony regarding an out-of-court suggestive identification procedure the court said (p. 801):

> "We can agree that the arrival, at 7 a.m., of two police officers bearing a single photograph carries some sugges-

tive connotations. But we do not think those facts sufficient in themselves to support the conclusion that appellant's conviction must be vacated. Insofar as cases such as *United States* v. *Fowler*, 439 F.2d 133 (9th Cir. 1971), may be read to announce a per se rule condemning as constitutionally infirm all evidence derived from single photo identifications, see *Workman* v. *Cardwell*, 338 F.Supp. 893, 895-96 (N.D. Ohio 1972), *aff'd.*, 471 F.2d 909 (6th Cir. 1972), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2748, 37 L.Ed.2d 161 (1973), we do not follow them. Single photo identifications do, indeed, present so serious a danger of suggestiveness as to require that they be given extremely careful scrutiny, but beyond stating this, we cannot provide a rule of thumb, as every suggestive identification case must be tested under the 'totality of the circumstances' standard of *Stovall* v. *Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967). *Simmons*, *supra* 390 U.S. at 383, 88 S.Ct. 967; *Neil*, *supra* 409 U.S. at 196, 93 S.Ct. 375."

Clearly there are differences of opinion among the Circuits as to the critical issue in the instant case.

II.

The Court of Appeals has ruled (Appendix, p. 26a) that "even if we should be wrong in all this and *Neil* v. *Biggers* was intended to apply the *Simmons* test to post-*Stovall* show-ups or photographic displays that were impermissibly and unnecessarily suggestive, as well as to in-court identifications following upon them, the writ should issue here." The Court then proceeded to evaluate the facts (Appendix, pp. 26a, 27a) and to substitute its judgment for that of the trier in the State court and the reviewing judge in the federal district court. The original description of Brathwaite given by Officer Glover to Detective D'Onofrio, of which testimony was received at trial, was deemed by the Appeal's Court to be inadequate; the identification testimony, because it came from an undercover police officer and because Brathwaite was sitting at the counsel table during the trial, was discredited; and plausibility was assigned to the alibi evidence when the same was rejected by the trier.

The review of the Court of Appeals was the narrow and limited one of due process, and whether it was violated. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 642, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). It was not the function of the Appeals Court, the due process question aside, to weigh and speculate about the significance of the facts and the credibility of the testimony, matters which were decided by the trier. *Rogers* v. *Richmond*, 365 U.S. 534, 545, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). On the contrary, the Court should have examined the evidence in the view most favorable to the prosecution, and had it done so it would have sustained the conviction. *Hamling* v. *United States*, 418 U.S. 87, 124, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974).

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

We, George D. Stoughton and Bernard D. Gaffney, Attorneys for the Petitioner, certify that a copy of the foregoing Petition was mailed, via U.S. Mail, postage prepaid, this 17th day of December, 1975, to the following attorneys of record: David Golub, Esq., 733 Summer Street, Stamford, Connecticut 06905; Martha Stone, Esq., 1800 Asylum Avenue, West Hartford, Connecticut 06117.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

STATE OF CONNECTICUT v. NOWELL BRATHWAITE

HOUSE, C. J., SHAPIRO, LOISELLE, MACDONALD and BOGDANSKI, *Judges*.

Argued March 8 — decided April 5, 1973

Information in two counts charging the defendant with the crime of selling heroin and with possession of a quantity of a narcotic drug, brought to the Superior Court in Hartford County and tried to the jury before *Dannehy, J.*; verdict and judgment of guilty of both crimes, from which the defendant appealed. *No error.*

Noble K. Pierce, for the appellant (defendant).

Bernard D. Gaffney, assistant state's attorney, with whom, on the brief, was *John D. LaBelle*, state's attorney, for the appellee (state).

PER CURIAM. The defendant was charged with (1) sale of a narcotic drug and (2) possession of a narcotic drug. A jury found him guilty of both counts and the defendant has appealed, assigning as error the denial of his motion to set aside the verdict and two rulings on evidence.

The defendant's attack on the court's denial of his motion to set aside the verdict is considered by examining the evidence printed in the appendices to the briefs in order to determine whether the jury acted fairly, intelligently and reasonably in rendering its verdict. *State* v. *Mayell*, 163 Conn. 419, 421, 311 A.2d 60; *State* v. *Shelton*, 160 Conn. 360, 361, 278 A.2d 782.

From the evidence offered, the jury could reasonably have found the following facts. In May, 1970, Trooper Jimmy Glover of the Connecticut state police was assigned to the narcotics squad in an undercover capacity. On the evening of May 5, 1970, at about 7:45 p.m., he went with an informant to an apartment on the third floor of a building at 201 Westland Street, Hartford. There was natural light coming through the windows in the hallway and Glover had no difficulty seeing in the hallway. He knocked at the door of an apartment and when the door opened, he observed a male standing in front of a female. Trooper Glover asked the man for some narcotics. The door was closed and after a few moments the door was reopened and Glover purchased two glassine bags containing a white powder for $20 from the male. Although Glover did not know the seller at that time, he stood within two feet of the seller and was looking at his face for two or three minutes. Two police officers acting as covering officers observed Glover enter the building and when Glover met with them later that same evening he showed them what he had purchased. A subsequent report from the state laboratory disclosed that the

white powder was heroin. When Glover described the seller to one of the officers, that officer recognized the description as that of the defendant and the next day left a photograph of the defendant at the state police headquarters for Glover to view. Glover made an in-court identification of the defendant as the person who had sold him the heroin. The defendant, who lives on Albany Avenue, Hartford, was arrested in July, 1970, at the apartment of Mrs. Virginia Ramsey, 201 Westland Street, Hartford.

The question presented by the defendant's claim that the court erred in refusing to set aside the verdict is whether the trial court abused its discretion. *State* v. *Benton*, 161 Conn. 404, 409, 288 A.2d 411. On the evidence presented, the jury were amply justified in concluding that the state had proven beyond a reasonable doubt that the defendant had possession of and made a sale of heroin. *State* v. *Savage*, 161 Conn. 445, 452, 290 A.2d 221; *State* v. *Brown*, 161 Conn. 219, 222, 286 A.2d 304. The court was not in error in refusing to set aside the verdict.

The defendant claims that the court erred in permitting officer Glover to make an in-court identification of the defendant. The defendant asserts that the court should have determined whether evidence of Glover's observance of the defendant's photograph shortly after the sale was prejudicial before it allowed the in-court identification of the defendant. There was no objection or exception to the evidence when offered and this claim first appears in the defendant's brief. The defendant has not shown that substantial injustice resulted from the admission of this evidence. Unless substantial injustice is shown, a claim of error not made or passed on by the trial court will not be considered on appeal. *State* v. *Bausman*, 162 Conn. 308, 315, 294 A.2d 312; *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585.

The defendant, who had testified in his own behalf, assigns error in the court's overruling of his objections to ques-

tions asked of him and one of his witnesses by the state on cross-examination. Detailing the relevant evidence given prior to each question and the objections made would serve no useful purpose. A trial court has wide discretion as to the allowance of questions involving relevancy and remoteness and also as to the scope of cross-examination. *State* v. *Towles*, 155 Conn. 516, 523, 235 A.2d 639; *State* v. *Keating*, 151 Conn. 592, 597, 200 A.2d 724, cert. denied, sub nom. *Joseph* v. *Connecticut*, 379 U.S. 963, 85 S.Ct. 654, 13 L.Ed. 2d 557. The questions asked were proper and relevant to the matters raised by the defendant's own testimony.

There is no error.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NOWELL A. BRATHWAITE

v.

JOHN MANSON, Commissioner of Correction of the State of Connecticut

Civil No. H-74-209

MEMORANDUM OF DECISION

The petitioner in this habeas corpus proceeding was convicted of possession and sale of heroin in Connecticut Superior Court on January 14, 1971. His conviction was upheld on appeal by the Connecticut Supreme Court. *State* v. *Brathwaite*, 164 Conn. 617 (1973). He is presently in the Connecticut Correctional Institution at Somers for a term of 6 to 10 years. He seeks relief in this court from his imprisonment pursuant to 28 U.S.C. § 2254 (1970).

Factually this case is quite simple. Leaving aside details for the moment, it may be summarized as follows: the State charged that an undercover police officer and informant went to an apartment in Hartford at about 7:45 p.m. on May 5, 1970. After they knocked on the door, it was opened 12 to 18 inches, revealing a man and, standing behind him, a woman.[1]

The officer asked the man for $20 of heroin and paid him that amount. The door closed, then opened again in a few moments, and the man gave the officer two glassine envelopes that were later shown by chemical analysis to contain heroin.

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[1] The informant testified that only a woman appeared and that the deal was conducted with her. However, he also testified that he was using narcotics at the time and that his memory was generally fuzzy as to what happened when he was using narcotics. The jury evidently disbelieved his version of the transaction.

The officer later identified the seller from a photograph and in court as Brathwaite. Brathwaite admitted that he knew the person who lived in the apartment where the transaction took place and had visited there.[2] However, he testified that he had been home (*i.e.*, at a different address) sick in bed all day on May 5. The defense presented medical testimony as to Brathwaite's ailments and the testimony of his wife that she had been at their home taking care of him throughout the day of May 5, 1970. The jury accepted the prosecution version and convicted.

The sole evidence tying Brathwaite to the possession and sale of the heroin consisted in his identifications by the police undercover agent, Jimmy Glover.[3] Although no objection was raised to these identifications at trial, error in allowing them was claimed (unsuccessfully) on appeal.[4]

The asserted error also forms the basis for the present petition for habeas corpus. Thus there is presented the somewhat paradoxical situation where the state's contemporaneous-objection rule would constitute an adequate state ground precluding Supreme Court review, but leaves open to the plaintiff a habeas remedy in a lower federal court.[5]

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[2] In fact, Brathwaite was arrested at that apartment on July 27, 1970.

[3] *Cf. United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159, 165 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973) (where other evidence sufficiently supports conviction, allowing unconstitutional identifications into evidence can be harmless error).

[4] Because the point had not been raised at trial the appellate court applied a "plain error" rule, concluding that "[t]he defendant has not shown that substantial injustice resulted from the admission of this evidence." 164 Conn. at 619. It is not clear whether this rule was based on the merits or on procedural grounds or on some meshing of the two.

The Connecticut Supreme Court also considered and rejected claims that the trial court erred in refusing to set aside the jury's verdict because of insufficiency of the evidence and that it erred in several evidentiary rulings. None of these claims are raised here.

[5] "[A] dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone precude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts . . . ." *Henry* v. *Mississippi*, 379 U.S. 443, 452 (1965).

The first issue that must be addressed is the procedural one of whether the objections to the identification testimony may be raised here. The habeas statute, 28 U.S.C. § 2254(b) (1970), requires that a prerequisite to this proceeding is exhaustion of state remedies. As to the objections to the identifications, the raising of their propriety on appeal to the Connecticut Supreme Court is sufficient to exhaust Brathwaite's state remedies, even though his counsel failed to object to them at trial.[6] *Cf. United States ex rel. Denegris* v. *Menser*, 247 F. Supp. 826 (D. Conn. 1965), *aff'd*, 360 F.2d 199 (2d Cir. 1966).[7]

The fact that there was no objection at trial raises the spectre of a deliberate bypass of state court procedures that might preclude asserting the objection here. *Cf. Henry* v. *Mississippi*, 379 U.S. 443, 451-452 (1965); *Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963). However, unlike the exhaustion of state remedies, this issue is not a jurisdictional one that a court must raise sua sponte. Rather, it is a defense that may be raised and must be proved by the respondent. *See United States ex*

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[6] The petitioner also raises a claim that he had ineffective assistance of counsel at his trial because there was no challenge made to Glover's identifications of him. *Cf. Saltys* v. *Adams*, 465 F.2d 1023 (2d Cir. 1972). However, a perusal of Brathwaite's brief on appeal indicates that this issue was not raised in the Connecticut Supreme Court. Nor has Brathwaite sought to raise this claim in a state habeas corpus proceeding, as he may properly do. *Cf. Fredericks* v. *Reincke*, 152 Conn. 501 (1965); *Hodge* v. *Reincke*, 25 Conn. Supp. 207 (Super. Ct.), *appeal dismissed*, 151 Conn. 736 (1964). Thus the exhaustion of state remedies required by 28 U.S.C. § 2254(b) (1970) has not occurred, and the claim of ineffective assistance of counsel will not be passed upon here. *See, e.g., Bartee* v. *Robinson*, Civ. No. H-74-312 (D. Conn. Oct. 8, 1974).

[7] In *DeNegris* I spoke of the "deliberate bypass" problem discussed in *Fay* v. *Noia*, 372 U.S. 391 (1963), as an element of exhaustion analysis. Courts since then have considered the deliberate bypass problem as an independent issue — analogous to waiver — which may prevent presentation of constitutional claims in habeas proceedings even if there has been exhaustion. *See, e.g., Saltys* v. *Adams*, 465 F.2d 1023 (2d Cir. 1972). Considering the latter approach better reasoned, I follow it here.

rel. Cruz v. *LaVallee*, 448 F.2d 671 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1972).[8] In this case the state has not contended that Brathwaite waived his right to challenge the identification testimony by the failure of his counsel to object to it at trial.[9] Thus the constitutional objection to its admission is properly before me for decision.[10]

The story behind these identifications is relatively uncomplicated. When Glover left the apartment at which he purchased the heroin he discussed what had occurred with a back-up officer outside, Detective D'Onofrio. He gave a description of the seller to D'Onofrio,[11] who thought he recognized Brath-

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[8] A more recent decision in this circuit, *United States* v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 43 U.S.L.W. 3239 (U.S. Oct. 21, 1974), might be read as holding that the court should raise the issue sua sponte and place the burden on the petitioner to show that there was no deliberate bypass. However the procedural posture of that case was not entirely clear. For example, it is not clear whether a hearing was held on the issue of deliberate bypass in *West*. *Cf. Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972). And it is possible, in reading the opinion, to conclude that the government had raised the issue in that case. *Cruz* is quite explicit by contrast. Absent any acknowledgment of *Cruz* or considered treatment of the issue in *West*, I do not read it as overruling *Cruz*.

[9] Indeed neither party addressed this issue, although specifically given leave by the court to brief the effect of the failure of Brathwaite's counsel to object to the admission of the identification evidence. Petitioner instead addressed the somewhat different issue of when a federal appellate court may consider an objection not made at trial. *See, e.g., United States* v. *Rose*, 500 F.2d 12, 17 (2d Cir. 1974). The respondent chose not to address the issue at all.

[10] The consideration of Brathwaite's constitutional point has been submitted to me by the parties for decision on the basis of the record and without a request for an independent factual hearing in this court. This procedure is permissible. The Connecticut Supreme Court's discussion of the evidence introduced at trial does not constitute "a determination after a hearing on the merits of a factual issue . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia," 28 U.S.C. § 2254(d) (1970); thus I am not bound by their view of the record. But neither does the case require a hearing on the facts underlying Glover's identification testimony, for they are not really in dispute. The question to answer is a legal one: do these facts give rise to a substantial likelihood of irreparable misidentification? *Cf. Townsend* v. *Sain*, 372 U.S. 293, 312 (1963) (emphasis added): "where an applicant for a writ of habeas corpus alleges *facts which, if proved, would entitle him to relief*, the federal court to which the application is made has the power to receive evidence and try the facts anew."

[11] "I described the person as being a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro

waite from what Glover told him. D'Onofrio obtained a picture of Brathwaite from police records and left it at Glover's office. Glover saw the photograph two days after the heroin purchase and identified it as a picture of the person from whom he had made the purchase. In court Glover asserted his positiveness that the photograph depicted the person who had sold him drugs. Glover also identified Brathwaite quite positively in court as the seller.[12]

The standards for the constitutionality of identifications are by now fairly clear. The first inquiry is whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification from the witness. If the answer is in the affirmative, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification, both when the photographic identification was made and when the in-court identification was made. *See Neil* v. *Biggers*, 409 U.S. 188, 196-200 (1972); *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *United States ex rel. Cannon* v. *Montanye*, 486 F.2d 263, 267-268 (2d Cir. 1973), *cert. denied*, 416 U.S. 962 (1974).

In this case Glover's initial identification of Brathwaite was made from a single photograph. There was no array of photographs and no line-up. In this circuit it is clear that this type of identification procedure is impermissibly suggestive. *See United States* v. *Reid*, Dkt. Nos. 74-2598, 74-2599 (2d Cir. Apr. 24, 1975); *United States ex rel. John [Armstrong]* v. *Cascles*, 489 F.2d 20, 24 (2d Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797, 801 (2d Cir.), *cert. denied*, 414 U.S. 924 (1973). Thus I pass to the second inquiry.

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style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." Tr. 36-37.

[12] Glover testified that he had not seen Brathwaite between the time he identified the photograph and the time he saw him in court. Tr. 41.

The Supreme Court in *Neil* v. *Biggers*, 409 U.S. 188, 199-200 (1972), spelled out the factors to be considered in determining whether there has arisen a substantial likelihood of irreparable misidentification:

> "As dictated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. . . ."

Applying these factors to the instant case indicates that no substantial likelihood of irreparable misidentification exists here. Glover was within two feet of the seller, standing across the threshold of the apartment from him. The exact duration of the confrontation is unclear from the record, but it lasted at least a couple of minutes. Tr. 19, 29-33, 60. Although there was no artificial lighting in the hallway where Glover was standing, there was natural light coming through a window or skylight.[13] Glover and the informant both testified that there was adequate light to see clearly in the hall. Tr. 28, 47. Thus Glover had a fairly good opportunity to observe the seller. Glover certainly was paying attention to identify the seller: he was a trained police officer who realized that he would later have to find and arrest the person with whom he was dealing. This conclusion is bolstered by the detailed nature of the description Glover gave his back-up officer, D'Onofrio.[14] There is no direct evidence on the accuracy of this description, but its reliability is supported by the fact that it allowed D'Onofrio

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[13] The incident occurred at about 7:45 p.m. on May 5, 1970. Glover testified that it was still daylight and that the day had been clear and sunny. Tr. 27.

[14] *See* note 11 *supra*.

to pick out a single photograph that was thereafter positively identified by Glover. Only two days elapsed between the crime and Glover's photographic identification. Although another eight months passed before the in-court identification Glover had "no doubt in [his] mind whatsoever" that the defendant was the person who had sold him heroin. Tr. 34, 41-42.

The identification testimony was not unconstitutional. "So long as the prosecution can demonstrate that the witness had some opportunity to observe the offender at the time of the crime, the witness can make an in-court identification and can testify concerning the pretrial identification regardless of the suggestiveness of the pretrial proceedings." Pulaski, *"Neil* v. *Biggers:* The Supreme Court Dismantles the *Wade* Trilogy's Due Process Protection," 26 Stan. L. Rev. 1097, 1120 (1974). The petition is dismissed. It is

SO ORDERED.

Dated at Hartford, Connecticut, this 13th day of May, 1975.

M. Joseph Blumenfeld
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 235 — September Term, 1975.

(Argued October 10, 1975 Decided November 20, 1975.)

Docket No. 75-2093

NOWELL A. BRATHWAITE,
Petitioner-Appellant,

v.

JOHN R. MANSON, Commissioner of Correction
of the State of Connecticut,
Respondent-Appellee.

Before:

KAUFMAN, *Chief Judge,*
and FRIENDLY and SMITH, *Circuit Judges.*

Appeal from an order of the District Court for Connecticut, M. Joseph Blumenfeld, *Judge,* denying a state prisoner's application for a writ of habeas corpus on the ground of allegedly unconstitutional identification procedures.

Reversed.

DAVID GOLUB, Esq., West Hartford, Conn. (Martha Stone, Esq., West Hartford, Conn., of Counsel), *for Appellant.*

BERNARD D. GAFFNEY, Assistant State's Attorney (George D. Stoughton, State's Attorney, State of Connecticut, of Counsel), *for Appellee.*

FRIENDLY, *Circuit Judge:*

On this appeal from an order of the District Court for Connecticut denying a state prisoner's petition for habeas corpus, we are confronted, as we recently were in *United States* v. *Reid,* 517 F.2d 953, 965-67 (2 Cir. 1975), with a defendant's claim that his constitutional rights were compromised by the prosecution's display of his photograph singly to a witness for identification. Although the facts are much less favorable to the prosecution than in *Reid,* the State claims to be entitled to prevail under the Supreme Court's latest identification decision, *Neil* v. *Biggers,* 409 U.S. 188 (1972).[1]

I.

The district court was not asked to conduct an evidentiary hearing, and we take the facts, as it did, from the state trial record.

Trooper Glover of the Connecticut State Police, who had been assigned to the Hartford narcotics squad in an undercover capacity, went with an informant, Henry Brown, around 7:45 p.m. on the evening of May 5, 1970, to an apartment on the third floor of a building at 201 Westland Street.[2] He knocked at the door of the apartment. When it was opened, he observed a man standing in front of a woman and asked for "two things" of narcotics. The door was closed for a few moments and then was reopened. The man had two glassine envelopes containing a white powder, later determined to be

[1] Excluding the identification cases turning on the right to counsel, the relevant earlier decisions are *Stovall* v. *Denno,* 388 U.S. 293 (1967); *Simmons* v. *United States,* 390 U.S. 377 (1968); *Foster* v. *California,* 394 U.S. 440 (1969); and *Coleman* v. *Alabama,* 399 U.S. 1 (1970).

[2] The record suggests that Glover and Brown may have intended to go to the apartment of "Dickie Boy" Cicero, a known narcotics dealer, who lived on the left side of the third floor, but by mistake went instead to that of Virginia Ramsey on the right side.

heroin, for which Glover paid $20.[3] Glover was within two feet of the seller and observed his face for two or three minutes; natural light was coming through a window at the hallway and Glover claimed to have had no difficulty in seeing.

When Glover left the building, he reported to a back-up officer outside, Detective D'Onofrio. He described the seller as being "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." D'Onofrio went back to the police records division and obtained a photograph of petitioner Brathwaite. D'Onofrio testified that he selected this photograph because he recognized Brathwaite as the person described by Glover and that he had previously seen Brathwaite "several times, mostly in his vehicle."[4] D'Onofrio took the photograph to the office of Glover's squad. On May 7 Glover identified it as depicting the seller of the narcotics. For reasons not disclosed by the record, Brathwaite was not arrested until late July, 1970; the arrest took place in Mrs. Ramsey's apartment at 201 Westland Street, see n.2.

At the trial in January, 1971, Glover testified to the photographic identification and also made an in-court identification of Brathwaite, who was sitting at the defense counsel table. He had no doubt about the identifications. The state presented no other evidence to show that Brathwaite was the seller.

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[3] This was Glover's testimony. Brown, called as a prosecution witness, testified in direct examination that he had no clear memory of the incident, owing, he claimed, to drug intoxication. On cross-examination he recalled, as he had in a conversation with the defense attorney on the preceding day, that only a woman opened the door and later produced the narcotics.

[4] The prosecutor sought to elicit that D'Onofrio had seen Brathwaite in the vicinity of the apartment house but the court sustained an objection.

Brathwaite testified that at the time of the sale he was at home, suffering from a variety of ailments including a serious back condition which had kept him from going out for several days. On the following day, May 6, he went to a doctor's office pursuant to a previously made appointment. According to him, Mrs. Ramsey was a friend of the family, who had driven his car when his back condition prevented him from doing so; she had called for him after he had had a myelogram at a hospital in July and also had driven him to her apartment on the day he was arrested there. Mrs. Brathwaite confirmed that her husband had been ill at home all day on May 5 and testified that Mrs. Ramsey had driven him to a doctor's office on May 6. Dr. Vietzke testified that Brathwaite had been assigned to him as a clinic patient on April 15; that he had found a lack of sensation in Brathwaite's legs which could (and ultimately was found to) indicate a disc involvement; that Brathwaite "moved like a man in great discomfort"; and that he referred Brathwaite to Dr. Owens, a neurosurgeon. Brathwaite's May 6 appointment was at the neurosurgical clinic where he was seen by Dr. Owens.

The jury having returned a verdict of guilty, Brathwaite appealed his conviction to the Supreme Court of Connecticut which affirmed, *State* v. *Brathwaite*, 164 Conn. 617 (1973). The portion of its opinion dealing with the identification issue is as follows, 164 Conn. at 619:

> The defendant claims that the court erred in permitting officer Glover to make an in-court identification of the defendant. The defendant asserts that the court should have determined whether evidence of Glover's observance of the defendant's photograph shortly after the sale was prejudicial before it allowed the in-court identification of the defendant. There was no objection or exception to the evidence when offered and this claim first appears in the defendant's brief. The defendant has not shown

> that substantial injustice resulted from the admission of this evidence. Unless substantial injustice is shown, a claim of error not made or passed on by the trial court will not be considered on appeal. *State* v. *Bausman*, 162 Conn. 308, 315, 294 A.2d 312; *State* v. *Fredericks*, 154 Conn. 68, 72, 221 A.2d 585.

This was followed by a petition for federal habeas and its denial by the district court.

II.

We must first consider the effect of the lack of objection to either the in-court or the photographic identification. As Judge Blumenfeld noted, this has two closely related aspects — the failure to exhaust state remedies and the effect of the state's contemporaneous objection rule on the availability of federal habeas.

As we read the opinion of the district judge, he regarded the consideration of petitioner's identification argument by the Supreme Court of Connecticut as meeting the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). We are not so sure. It is, of course, true that plenary consideration of such an objection by a state appellate court meets the exhaustion requirement even though, under ordinary procedural rules, the court was not obliged to give this. However, our reading of its opinion leads us to believe that the Supreme Court of Connecticut considered the point on a more limited basis, namely, whether even if petitioner's objections were sound, "substantial injustice resulted" from receipt of the identifications. It is doubtful whether such limited review would meet the exhaustion requirement if Connecticut provided a method for raising the federal claim in a collateral attack. The presentation to a state appellate court which obviates any need for resort to state collateral proceedings, *Brown* v. *Allen*, 344 U.S. 443, 448-49 n.3 (1953), is predicated on a disposition on the

merits which would foreclose a successful collateral proceeding. We believe, however, that the Connecticut Supreme Court's disposition of petitioner's claim, while less than a full consideration on the merits, would be considered by the Connecticut courts to be enough to bar a subsequent collateral proceeding since "Connecticut's rule [is] that [state] habeas corpus cannot serve as an appeal for questions which might have been raised for direct review," *United States* v. *Menser*, 247 F. Supp. 826, 829 (D.C. Conn. 1965); *Wojculewicz* v. *Cummings*, 143 Conn. 624, 628, 124 A.2d 886, 890-91 (1956). If this be so, the exhaustion requirement of 28 U.S.C. § 2254 would pose no obstacle to petitioner since "§ 2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court." *Fay* v. *Noia*, 372 U.S. 391, 435 (1963).

However, it is unnecessary to decide this since the respondent has not here raised a claim of failure to exhaust state remedies, and the requirement is not jurisdictional but merely a principle of comity, *id.* at 434-35. For the same reason, namely, the State's failure to raise the point here, we need not consider whether *Fay* v. *Noia*, *supra*, 372 U.S. at 426-34, 438-40, would be read today as relieving Brathwaite, in federal habeas, of his counsel's procedural default, even though, for the reason indicated above, we doubt whether the Connecticut Supreme Court's limited consideration of Brathwaite's objections would bring the case within the principle of *Warden* v. *Hayden*, 387 U.S. 294, 297 n.3 (1967), that a state may not assert "deliberate by-pass" when a petitioner's constitutional claims have in fact been passed upon by a state court despite breach of a contemporaneous objection rule.

III.

Respondent concedes that exhibition of the single photograph of Brathwaite to Glover was "impermissibly suggestive" within many decisions of this court. See, *e.g.*, *United States ex*

rel. Gonzalez v. *Zelker*, 477 F.2d 797, 801 (2 Cir. 1973), *cert. denied*, 414 U.S. 924 (1974); *United States ex rel. John* v. *Casscles*, 489 F.2d 20, 24 (2 Cir. 1973), *cert. denied*, 416 U.S. 959 (1975); *United States* v. *Reid*, *supra*. Not only was it impermissibly suggestive[5] but, despite the unexplained statement to the contrary in respondent's brief, it was unnecessarily so. There was no emergency that prevented D'Onofrio from assembling a suitable array of photographs from the many fitting Glover's description that must have been available in the files of the Hartford Police Department. In fact there was little urgency that D'Onofrio waited two days to display Brathwaite's photo for Glover's identification and three months to make Brathwaite's arrest. D'Onofrio selected the single photograph not because of any difficulty in securing more but because, without having witnessed the event, he was certain Brathwaite had made the sale, see fn. 5.

Prior to *Neil* v. *Biggers*, *supra*, this alone would have permitted a speedy resolution of the case. This court and others had held that, except in cases of harmless error, a conviction secured as the result of admitting an identification obtained by impermissibly suggestive and unnecessary measures could not stand, see *e.g.*, *United States* v. *Fernandez*, 456 F.2d 638, 641-42 (2 Cir. 1972); *Kimbrough* v. *Cox*, 444 F.2d 8 (4 Cir. 1971); *United States* v. *Fowler*, 439 F.2d 133 (9 Cir. 1971); *Mason* v. *United States*, 414 F.2d 1176 (D.C. Cir. 1969), although, following the lead of *United States* v. *Wade*, 388 U.S. 218, 239-40 (1967), we allowed the prosecution to by-pass the tainted identification and introduce subsequent identifications

[5] The impermissible suggestiveness evoked by the presentation of a single photograph was enhanced by D'Onofrio's earlier statement to Glover that, on the basis of the latter's extremely general description of the seller of narcotics, D'Onofrio knew who the man was. D'Onofrio's subsequent presentation of Brathwaite's photograph was in substance a request to Glover to endorse his conclusion that, despite his own lack of observation of the sale, Brathwaite was the man.

or have the witness make an in-court identification[6] if satisfied that these stemmed from the original observation of the defendant rather than the tainted identification. *United States ex rel. Phipps* v. *Follette*, 428 F.2d 912 (2 Cir. 1970), *cert. denied*, 400 U.S. 908 (1970); *United States ex rel. Gonzalez* v. *Zelker*, *supra*, 477 F.2d at 801-05. Here there would have been no occasion to consider whether Glover's in-court identification rested on his original observation (except for the bearing of this on a new trial) since the admission of the photographic identification would have been fatal constitutional error.

A passage in *Neil* v. *Biggers*, *supra*, 409 U.S. at 198, calls this analysis into some question. After saying that "the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification,'" the inner quote being from *Simmons* v. *United States*, *supra*, 390 U.S. at 384, Mr. Justice Powell continued:

> While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of "irreparable" it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.[5] It is the

[6] The difference for the prosecution between being allowed to offer evidence of a pretrial identification and being remitted to an in-court identification is substantial. A jury would naturally regard an identification made shortly after the crime as much more probative than an in-court identification. This is especially true of the perfunctory type of identification where the defendant is sitting at the counsel table; indeed it would seem that only the apparent weakness of this kind of identification, along with its traditional character, saves it from condemnation as being itself impermissibly suggestive. On the other hand, if the defendant is placed with spectators, in-court identifications have been known to go wrong — sometimes because the defendant will have deliberately altered his appearance. Moreover, cross-examination may seriously weaken an in-court identification; the prosecution suffers a real loss if not allowed to buttress this with an earlier one.

[7] A commentator has described the *Stovall* test as having

> focused exclusively on the propriety or impropriety of the police conducted identification procedure in light of two factors: (1) the identification procedure employed was suggestive and

> likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as *Stovall* makes clear, the admission of evidence of a showup without more does not violate due process. (Footnote omitted.)

If this stood alone, it would strongly support a conclusion that the Court intended the "very substantial likelihood of misidentification" test[7] to apply to show-up or photographic identifications that were impermissibly and unnecessarily suggestive as well as to later out-of-court or in-court identifications.[8]

However, Mr. Justice Powell also said, 409 U.S. at ~~198-99~~ 198-199:

> What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence . . . . The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process. *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 48, 408 F.2d 1230, 1251 (1968) (Leventhal, *J.*, concurring); cf. *Gilbert* v. *California*, 388 U.S. 263, 273 (1967); *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Such a rule would have no place in the present case, since both the confrontation and the trial preceded *Stovall* v. *Denno*, *supra*, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

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conductive to irreparable misidentification, and (2) whether the identification procedure was "unnecessary." (footnotes omitted)

whereas the *Simmons* test decided

> the due process inquiry by looking at the result: Given the facts of the case, how likely was it that the eyewitness misidentified the defendant?

Pulaski, *Neil* v. *Biggers*, The Supreme Court Dismantles the *Wade* Trilogy's Due Process Protection, 26 Stan. L. Rev. 1097, 1107-08 (1973).

[8] The last sentence in the quotation deserves close reading. We had understood *Stovall* to mean that admission of the identification at the impermissibly suggestive hospital show-up (as distinguished from later identifications) would have led to a reversal in that case except for the necessity imposed by what was considered to be the victim's precarious health. 388 U.S. at 302. The latter must be what was meant by the phrase "without more."

Although the commentators differ concerning the meaning of this passage,[9] we think that, at minimum, it preserves, in cases where both the confrontation and the trial were subsequent to *Stovall*, the principle requiring the exclusion of identifications resulting from "unnecessarily suggestive confrontation." This construction is powerfully supported by the citations in the last quotation. The passage in Judge Leventhal's concurring opinion in *Clemons* v. *United States*, 408 F.2d at 1251, drew a sharp distinction between "post-*Wade* trials" and a case where "a trial, as well as the identification, has taken place prior to *Wade* and *Stovall*." The *Clemons* majority had also said that the exclusionary rule "would appear to be applicable with respect to prosecution evidence of post-*Stovall* pre-trial identifications found by the court to be violative of due process," 408 F.2d 1236-37 (McGowan, *J.*,); see also the characterization of the majority's position in Judge Wright's concurring and dissenting opinion, 408 F.2d at 1252-53. Equally clearly the citations to *Gilbert* and *Mapp* point to a principle of exclusion. It is true, as the commentators have pointed out, that there is some novelty in applying the non-retroactivity principle to this portion of the *Stovall* opinion, 388 U.S. at 201-02, which

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[9] See Pulaski, *supra*, 26 Stan. L. Rev. at 1116-18; Grano, *Kirby, Biggers and Ash: Do any Constitutional Safeguards Remain against the Danger of Convicting the Innocent?*, 72 Mich. L. Rev. 717, 773-86 (1974).

reads on its face as if it were to have the usual application[10] as distinguished from the solely prospective authority decreed for the *Wade* and *Gilbert* decisions. But experience may have convinced the Court that retroactive application of this portion of *Stovall* also would have too drastic an effect on law enforcement; it was, as said in *Neil* v. *Biggers, supra,* 409 U.S. at 199, the first occasion on which the Court "gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury."

This interpretation of *Neil* v. *Biggers* — that it qualified the *Stovall* standard only with respect to pre-*Stovall* cases — has been adopted expressly by the Fourth Circuit, *Smith* v. *Coiner,* 473 F.2d 877, 880-81 (1973), *cert. den. sub nom. Wallace* v. *Smith,* 414 U.S. 1115 (1973), and seemingly by the Fifth Circuit, *Rudd* v. *State of Florida,* 477 F.2d 805, 809 (1973), and the Sixth Circuit, *Workman* v. *Cardwell,* 471 F.2d 909, 910 (1972), *cert. denied,* 412 U.S. 932 (1973). Cf. *Souza* v. *Howard,* 488 F.2d 462, 465 (1 Cir. 1973), *cert. denied,* 417 U.S. 933 (1974). We do not consider that *United States* v. *Evans,* 484 F.2d 1178, 1186 n.8 (1973), committed us to a contrary position. In that case the prosecution offered only an in-court identification and the tainted previous photographic identification was introduced by defense counsel in an effort to impeach the direct testimony of the identifying prosecution witnesses. See *United States* v. *Evans,* 72 Crim. 910 Transcript at 118, 136. We read the footnote as meaning only that the court rejected in light of *Neil* v. *Biggers,* a *per se* exclusionary rule for in-court identifications because the prosecution has used a less reliable method for obtaining a prior identification when a more reliable one was available.[11] On the other hand,

[10] Some might prefer "what used to be the usual application."

[11] The subsequent history of the *Evans* case illustrates the dangers of in-court identifications after suggestive pre-trial identification. As a result of the later arrest and confession of another person, the United States Attorney consented to an order vacating Evan's conviction. See the order of the District Court for the Southern District of New York dated November 5, 1975, in 75 Civ. 2253; see also order of the same date in 72 Cr. 204.

the treatment of the problem in *United States* v. *Boston,* 508 F.2d 1171 (2 Cir. 1974), is consistent without analysis.

These conclusions, based upon a textual analysis of *Neil* v. *Biggers* and the subsequent decisions of the courts of appeals, are reinforced when the case is placed in its setting. A good starting place is Mr. Justice Brennan's observation in *United States* v. *Wade, supra,* 388 U.S. at 228:

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification

and the large body of literature cited in footnotes 6 and 7 388 U.S. at 228-29 to support this. The *Wade* and *Gilbert* decisions represented one way of responding with respect to lineups; this was supplemented by the ruling in *Stovall* that due process was violated by receiving an identification arising from a confrontation which is "unnecessarily suggestive and conducive to irreparably mistaken identification," 388 U.S. at 301-02. The subsequent statement in *Stovall* that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it" was not a blanket invitation to use suggestive confrontations whenever a witness might reasonably be expected to be able to resist the suggestion. It was directed at the particular need for the confrontation there at issue — that the immediate showing of Stovall to the hospitalized victim, Mrs. Behrendt, was imperative[12] — not to the fact that the hospital identification was

[12] As the writer of a dissent to this court's en banc affirmance of the denial of habeas in *Stovall,* 355 F.2d at 744, I have always wondered why the Supreme Court so readily accepted the view that Mrs. Behrendt was *in extremis* at the time of the show-up, see 355 F.2d at 744, and failed to consider why if five police officers and prosecutors could have been assembled in her hospital room without danger to her health, one or two blacks could not have been found and allowed to accompany Stovall.

almost certainly correct. Significantly the Court did not refer to the large amount of circumstantial evidence, see 355 F.2d at 733-34, which made it almost certain that there was no misidentification.

The Court next encountered the problem in *Simmons* v. *United States, supra,* 390 U.S. 377.[13] In contrast to *Stovall,* where the witness had testified to the show-up identification as well as making an in-court identification, the witnesses in *Simmons* had done only the latter. It was in this context that Mr. Justice Harlan said, 390 U.S. at 384:

> [W]e hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

We do not regard this language as departing from the brief statement in *Stovall.* Indeed Justice Harlan said his standard accorded with the Court's "resolution of a similar issue" in *Stovall,* 390 U.S. at 394. The language was different because the issue was different. *Stovall* held that where the police or a prosecutor had engaged in indefensible identification procedures, they must be deprived of the immediate fruits. *Simmons* held, consistently with the Court's approach in *Wade* (which in turn had relied, 388 U.S. at 341, on the doctrine with respect to fruits of a primary illegality announced in *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963)), that such an error should not always deprive the Government of testimony of later identifications that might be essential to a

[13] Although *Simmons* involved the use of photographs rather than a show-up, it has never been suggested that there should be a less stringent rule for the presentation of a single photograph than for a show-up.

conviction; it should do so only when the error was irreparable. See *United States ex rel. Phipps* v. *Follette, supra,* 428 F.2d at 914 n.2. In *Foster* v. *California, supra,* 394 U.S. 440, which, like *Stovall,* involved both testimony as to an improper lineup identification and an in-court identification, the Court returned to the *Stovall* formulation, 394 U.S. at 442, and added that "it is the teaching of *Wade, Gilbert* and *Stovall, supra,* that in some cases *the procedure* leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law," 394 U.S. at 442-43 n.2 (emphasis supplied).

As cases in the wake of *Stovall* and *Simmons* began to reach them, the courts of appeals tended to use the *Simmons* formulation. Stress was placed on such factors as the witness' opportunity and incentive for observation at the time of the crime, the accuracy of description furnished before the suggestive identification, the witness' level of certainty, the lengths of time between the crime and identification and the trial, and even the existence of other evidence tending to show that the identification was not mistaken. See, *e.g., United States ex rel. Rutherford* v. *Deegan,* 406 F.2d 217 (2 Cir.), *cert. denied,* 395 U.S. 983 (1969); *United States ex rel. Phipps* v. *Follette, supra,* 428 F.2d 912; *United States ex rel. Frasier* v. *Henderson,* 464 F.2d 260 (2 Cir. 1972). But in the cases cited and at least most of the others the prosecution, following the lead of *Wade,* relied only on a subsequent, usually in-court identification,[14] and the language from *Simmons* was treated as a sort of combination of the *Wade* independent source principle with a

[14] An exception in this circuit is *United States* v. *Abbate,* 451 F.2d 990, 992 (2 Cir. 1971), in which the court mentioned the *Simmons* test in connection with a suggestive out-of-court identification but seems ultimately to have relied on a finding of harmless error. Since a remand was found necessary in *United States ex rel. Cannon* v. *Montanye,* 486 F.2d 263, 266-68 (2 Cir. 1973), which involved both an out-of-court and an in-court identification, the court was not required to and did not decide whether the same standards should govern both.

caution — perhaps due to a realization that the effect of the prior identification could never be wholly eradicated — that this might not suffice to avoid reversal unless the court was fairly assured that no harm was being done. The prosecution generally did not even assert that a suggestive identification made without an imperative necessity, such as existed in *Stovall* or in the immediate confrontation cases such as *Bates* v. *United States*, 405 F.2d 1104 (D.C. Cir. 1968) (Burger, *J.*), and *Russell* v. *United States*, 408 F.2d 1280 (D.C. Cir.), *cert. denied*, 395 U.S. 928 (1969), could themselves be received in evidence.

In light of this survey and our analysis of the opinion itself, we do not think *Neil* v. *Biggers* intended to change the rule previously applied, except to subject to the more lenient *Simmons* test impermissibly and unnecessarily suggestive pre-*Stovall* identifications. For such post-*Stovall* identifications the rule remains as *Stovall* and *Simmons* left it. Evidence of an identification unnecessarily obtained by impermissibly suggestive means must be excluded under *Stovall*, and the more lenient *Simmons* language and the criteria worked out under it apply only to identification subsequent to the impermissible show-up, with the prosecution having the burden of proving that the precautionary conditions of *Simmons* have been met. No rules less stringent than these can force police administrators and prosecutors to adopt procedures that will give fair assurance against the awful risks of misidentification.

IV.

Even if we should be wrong in all this and *Neil* v. *Biggers* was intended to apply the *Simmons* test to post-*Stovall* show-ups or photographic displays that were impermissibly and unnecessarily suggestive, as well as to in-court identifications following upon them, the writ should issue here. Although Glover testified that the hallway was well lit by sunlight, we

can take judicial notice that on May 5, 1970 sunset at Hartford took place at 7:53 p.m. While Glover was a "trained observer," see *United States* v. *Reid*, *supra*, 517 F.2d at 966, he was in a very different position from Agent Shea in that case. Shea had been the victim of a brutal assault; Glover was acting as an undercover agent — whose business was to cause arrests to be made — and his description of the suspect, while apparently covering Brathwaite, could have applied to hundreds of Hartford black males. The certainty of identification is far less persuasive when the expressions come from the lips of an undercover agent, especially under the circumstances developed in notes 2 and 3, than when they are the words of an ordinary citizen, whether a bystander or a victim. The in-court identification has little meaning; Brathwaite was at the counsel table and Glover must have made dozens of identifications in the eight months between the narcotics sale and the trial. Perhaps the strongest bit of evidence to strengthen the identification was Brathwaite's arrest in the very apartment where the sale was made. But Brathwaite offered an explanation of this which was not implausible, although evidently not credited by the jury, and the long and unexplained delay in his arrest is troubling. Assuming, which we do not believe, that *Simmons* states the appropriate test for both of Glover's identifications, we hold that both were inadmissible. The danger that Brathwaite was convicted because he was a man whom Detective D'Onofrio had previously observed near the scene of the crime, thought to be a likely offender, and arrested when he was known to be in Mrs. Ramsey's apartment, rather than because Glover really remembered him as the seller, is too great to let this conviction stand.

The judgment is reversed with instructions to issue the writ unless Connecticut gives notice of a desire to retry Brathwaite within twenty days after issuance of the mandate and the retrial occurs within such reasonable period thereafter as the district judge may fix.